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SEP 18 1957
JOHN T. FEY, Clerk

No. 84

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRANK MASCIALE, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari To the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority opinion of the Court of Appeals (R. 113-117) and the dissenting opinion (R. 117-120) are reported at 236 F. 2d 601.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1956 (R. 120-121). On September 13, 1956, Mr. Justice Harlan granted an extension of time within which to file a petition for a writ of certiorari until October 22, 1956, and the petition was filed on October 20, 1956 (R. 121). The

petition was granted on February 25, 1957 (R. 122). 352 U.S. 1000. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly submitted the issue of entrapment to the jury, on the ground that there was sufficient evidence that petitioner, charged with participation in an unlawful sale of heroin, was predisposed to commit the offense and was ready and willing to do so when offered the opportunity.

STATEMENT

In the United States District Court for the Eastern District of New York, petitioner was found guilty by a jury (R. 110-111) on counts 2, 3, and 5 of a five count indictment (I 2-4) which charged him with participation in a sale of one ounce and 106 grains of heroin hydrochloride in violation of 26 U.S.C. 2553(a), 26 U.S.C. 2554(a), 21 U.S.C. 174, and 18 U.S.C. 2. Petitioner was sentenced to three years' imprisonment on each of counts 2, 3, and 5, the terms to run concurrently and was fined $100 on each of these counts (R. 111-112). The Court of Appeals affirmed, Judge Frank dissenting (R. 113-121).

Neither in the courts below nor in this Court has petitioner denied the sale and his participation. He claims, however, that he was entrapped. On this point, the evidence may be summarized as follows:

In late 1953, Gene Marshall, an agent of the Federal Bureau of Narcotics, engaged one Jack Kowel

as a special employee to locate "pushers" or sellers of narcotics (R. 16-17). Marshall testified that Kowel told him that he had a contact, "Chappie" (petitioner), for whom he had been intermediary in a sale of 700 ounces of quinine, and that "Chappie" had told Kowel "if he ever had anyone who was interested in purchasing narcotics, he should bring him over." Marshall then said to Kowel, "Let's go and see Chappie" (R. 18).

On January 14, 1954, at the Park Ridge Bar in Brooklyn, Kowel introduced Marshall to petitioner ("Chappie"). According to Marshall's testimony, "Chappie, Jack [Kowel] and I then sat down in one of the booths and almost immediately we started to discuss the narcotics traffic. I told Chappie that I was interested in large quantities of drugs, heroin to be exact, and not as a street pusher, * * * I posed as a seller out of New York City and I was only interested in good and large quantities, and he should tell me right away if he is not the person to see, then we will finish this conversation pleasantly right then and there" (R. 6-7). Petitioner questioned Marshall as to the extent of his dealings in the narcotics traffic. Petitioner stated that he was primarily a gambler and not a narcotics trafficker, but that he "knew the right people in the narcotics traffic". He explained that up to about one week before that time (January 14, 1954) he had a source for heroin, but that "somehow he had a falling out with these people". He also mentioned that he "knew someone whom he considered high up in the narcotics traffic"

who could supply Marshall with 88 percent pure heroin. Petitioner gave Marshall a telephone number where the agent could reach him (R. 7, 20). He told Marshall he was interested in making a narcotics sale since he "needed money" (R. 27).

During the next six weeks, Marshall spoke to petitioner about ten times, usually on the telephone. Petitioner reported that as yet he had been unable to locate a source of supply (R. 8, 21). On one occasion in January 1954, Marshall drove with petitioner at the latter's direction "all through Brooklyn", discussing the narcotics traffic and petitioner's inability to introduce Marshall to the right source of supply. At one point, petitioner alighted from the automobile, and upon his return "said that he had just seen someone who he thought was good, but that this person wouldn't help us out at this time but that we might be able to do something at a later date" (R. 8-9).

On March 1, 1954, petitioner arranged a meeting with Marshall and another agent, Finley, at a restaurant. According to the testimony of Seifert,[1] petitioner earlier that day had come to him as a source for narcotics (R. 31). Petitioner introduced the agents to Seifert, who asked petitioner if they were "O.K.", or trustworthy. Seifert offered to supply the agents with heroin at $400 per ounce (R. 9). It was agreed that Seifert was to "take care of Frank

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[1] Seifert was a co-defendant who entered a plea of guilty and was sentenced on counts 3 and 5 of the indictment (R. 2, 30). He testified at the trial as a government witness (R. 30-42).

[petitioner]" by dividing $100 profit from the sale (R. 10, 33-34). Seifert made a telephone call to one Curtis, his source of supply, and delivery was planned the next morning, March 2, 1954 (R. 10, 34-35). At the rendezvous on this date at about 10 a.m., the agents found petitioner and Seifert waiting in a car owned by petitioner's sister. When Marshall hesitated at making a $200 partial payment in advance, petitioner assured the agents that Seifert was trustworthy, and loaned his (his sister's) car to Seifert while he (petitioner) remained with the agents to demonstrate Seifert's good faith (R. 10-11, 22). At about 12:30 p.m., petitioner left the agents to go to another appointment (R. 11, 46-47). At 2:00 p.m. Seifert returned, received the additional $200 payment, and told Marshall where he could pick up the heroin in a brown paper bag which was in a shoe box which had been placed in a Pepsi-Cola box (R. 12, 47). Chemical analysis disclosed that the package contained about 1¼ ounces of heroin hydrochloride (R. 28-29, 12-13, 14-16).

About March 5, 1954, Marshall telephoned petitioner to complain about the quality of the heroin and to state that the $400 price was exorbitant. Petitioner promised he would contact Seifert to straighten out the matter. Petitioner was arrested on April 5, 1954 (R. 23-24).

Petitioner testified at the trial that he first met Kowel, known to him under the name of Jake Paveleski, in 1950 (R. 50, 51). He said Kowel sold him garments and offered to sell him marijuana (R. 52). In the latter part of 1953, Kowel tried to get him to

sell quinine but petitioner never sold it although he pretended to make an effort (R. 56, 60, 63). In the quinine negotiations, petitioner testified, Kowel continuously and persistently importuned petitioner to engage in narcotics traffic, suggesting that a large amount of money could be made (R. 52, 56, 59, 63), but petitioner rejected all suggestions (R. 52, 57, 58, 59, 63, 65, 66, 67). Ultimately, Kowel told him that he had a narcotics buyer with a lot of money, "something big" (R. 64). Responding to the question, "Did he [Kowel] say anything to you about your putting up a front"?, petitioner testified that Kowel told him to pose as a "big narcotics handler * * * influenced with a lot of people" (R. 65). Petitioner claimed that Kowel wanted him to impress Marshall that he (Kowel) could produce narcotics (R. 68, 72, 88). Petitioner testified that he refused at first but finally agreed with Kowel to meet Marshall (R. 65-68). He admitted getting Marshall's hotel telephone number at the meeting on January 14, 1954, but denied that he had given his (R. 67, 69-70). Petitioner admitted that on the following day, in the absence of Kowel, he told Marshall that he was "trying" to get narcotics, but testified that he was not actually trying (R. 70-71). He testified that he received telephone calls from Marshall and Kowel requesting action (R. 71, 72), and stated that on February 12 or 15, 1954, he received "$200 or $400" from Marshall but later returned the money since he had only pretended to have a narcotics buyer. Petitioner explained that his purpose was "to impress him [Marshall]" and "not to make Jake [Kowel] a

fool" (R. 74-76, 94). Petitioner testified that one week before the sale alleged in the indictment (on March 2, 1954) Marshall accused him of not trying, but he assured him that he was trying (R. 80). He also told Marshall that he had a new prospect (Seifert), and that he thought he could get some narcotics from him (R. 82).

On cross-examination, petitioner admitted he had not spoken to Kowel before he talked with Seifert about narcotics, and that, so far as he (petitioner) knew, Kowel was "no longer in the picture" (R. 85-86), and "no longer concerned in the transaction" (R. 92). Petitioner admitted that he asked Seifert whether he could obtain narcotics (R. 95-96); and that he introduced Marshall to Seifert for the purpose of arranging the narcotics sale (R. 85). Petitioner denied knowing any gamblers, and said that his statement to Marshall that he knew about narcotics through his gambling contacts was Kowel's doing (R. 89). He admitted two previous convictions on gambling charges (R. 89). On direct examination, he admitted conviction on a plea of guilty of a conspiracy to commit robbery (R. 77). He said he told Marshall he needed money to pay his lawyer (R. 87).

2. With respect to entrapment, the trial court charged the jury as follows:

> The burden of the defense challenges your most careful attention. The defense relies on what is called entrapment. Now, that means that the defendant asserts that the testimony shows that the sale of these narcotics, or of this

package of narcotics, was brought about because the Government induced the defendant to play whatever part he did play in that transaction, and from that the defendant argues that since the Government—and the testimony I will discuss in a moment—since the Government was the active agency in bringing about this transaction the defendant must be turned loose; he must be found not guilty.

Now, that is not the law. The law says that the Government may provide the means whereby a violation of the law is established but it may not poison the mind of a person who would not otherwise indulge in that conduct, and then hold him to be guilty.

In other words, the task of the jury is to ascertain from the evidence in the case whether this defendant was ready and willing to participate in this sale of narcotics, or whether he was not ready and willing; whether there was not in his mind an acquiescence or a willingness to go through with an illegal transaction.

Now, that isn't too easy an idea to wrestle with, and so I mention it at the outset so that you will follow the rest of the charge with that initial suggestion in mind. [R. 97-98.]

* * * *

Now I will go back to that subject that I mentioned at the outset—this question of entrapment—and I do that because, as I must remind you, the defense does not dispute the transaction related by the Government witnesses—the sale and delivery of this package of heroin. The defendant's case turns upon this question of whether he was induced, being otherwise not inclined, to disobey this branch of the law; that

he was induced to do it, first, through interviews with this person who is known to us by two names, Jack Kowel and Jack Paveleski. * * * [R. 103.]

* * * *

Now, the general subject of the interview of course was the purchase of narcotics, and I don't understand—and if I am wrong disregard what I say—I don't understand that the defendant denies that. He told you at great length of a series of interviews, personal and over the telephone, between him and this man Kowel, that preceded the interview of January 14, and thus we have the defendant's version that this purchase was suggested to him by the Government.

Since Kowel is not a witness and Marshall has told you that Kowel was there you may wish to accept the defendant's version of Kowel's initial suggestion to him.

I told you at the outset that the law is that if the Government does the inducing the Government then must demonstrate to you that the defendant was not averse to going along; that the defendant was willing to follow up and to do whatever was required in order to bring about a sale of this heroin. The subject has received the attention of the courts from time to time and because I think it may help you to reach a conclusion I am going to ask you to listen while I read a few passages from the opinion in the case of the United States vs. Sherman, 200 Fed. Reporter, 2nd, at Page 880, which was also a narcotics case, and I am reading from Page 882 where reference is made to

a Supreme Court decision, and this language was used:

"The controlling question is whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the creative activity of its own officials."

Continuing, the opinion from which I am reading says:

"We suggested three excuses for an inducement. An existing course of similar criminal conduct; the accused [sic] already formed design to commit the crime or similar crimes; his willingness to do so as evidenced by a ready complaisance."

Now, again from the same page:

"As we understand the doctrine it comes down to this: That it is a valid reply to the defense"—that is, the defense of entrapment—"if the prosecution can satisfy the jury that the accused was ready and willing to commit the offense charged whenever the opportunity offered. In that event the inducement which brought about the actual offense was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person but has only provided the means for the accused to realize his pre-existing purposes. The proof of this may be by evidence of his past offenses, of his preparation, even of his ready complaisance. Obviously it is not necessary that the past offenses proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offenses of the sort charged."

> Please accept that as the law. It will be for you to say, having examined the evidence, having listened to the testimony of the witnesses, whether this defendant has been shown by the margin of proof that I have explained to have been "ready and willing" to commit the offense charged. [R. 104-105.]

SUMMARY OF ARGUMENT

Petitioner's argument that the issue of entrapment should not have been submitted to the jury rests on the erroneous factual assumption that the jury was bound to accept his testimony concerning Kowel's inducements to him, and on the erroneous legal theory that predisposition to commit a crime had to be proved by previous offenses.[2] Neither assumption is justified.

I.

The evidence before the jury presented a conflict on the issue of entrapment. On the one hand, there was testimony by the government, confirmed by some of petitioner's own testimony, that he was independently interested in engaging in the narcotics trade before Marshall, the government agent, posed as a buyer; and that petitioner showed himself eager to accomplish a sale when the buyer appeared. On this evidence, the offer by the government agent to buy was merely an offer to a person who already had the criminal design, merely enabling him to execute his

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[2] Petitioner does not attack the trial court's instructions on entrapment (*supra*, pp. 7-11).

previous purpose. On the other hand, there was petitioner's version that he had no thought of dealing in narcotics until Kowel put the idea in his mind. The conflict was one for the jury to resolve. *Sorrells* v. *United States*, 287 U.S. 435. The jury was not obliged to believe petitioner's self-serving testimony which was replete with inner contradictions. It could reasonably conclude, on the basis of the evidence favorable to the prosecution, that petitioner had not been entrapped.

II.

The fact that petitioner was not shown to have previously dealt in narcotics does not *per se* establish the defense of entrapment. The issue is whether a person otherwise innocent has been induced to commit crime by the creative activity of government officials. *Sorrells* v. *United States*, 287 U. S. 435, 451-2. Proof of prior similar action would be relevant as tending to disprove innocence on the part of the defendant. But proof of prior similar action is not the only way to show that the intention to commit the crime originated with the defendant, and not with the government officials. It is impossible to categorize all the types of proof that could be relevant on such an issue. The test must always be, in a particular case, whether the evidence is relevant to the central issue as defined in *Sorrells*. Judge Learned Hand did, however, in *United States* v. *Sherman*, 200 F. 2d 880 (C.A. 2), summarize the usual types of evidence that would show prior criminal predisposition, and it was on the theory of *Sherman* that

this case was submitted to the jury. As shown in Point I, the government's evidence reasonably supports the finding of the jury that the criminal intent was the product of petitioner's mind, and not the result of the government's creative activity. No talismanic class of evidence—such as prior offenses or dealings in narcotics—is essential or required.

ARGUMENT

The jury has found, on the evidence, that petitioner was not entrapped; that, although the suggestion for the actual narcotics sale first came from the government, petitioner was shown beyond a reasonable doubt to have been "ready and willing" to commit the offense charged.[3] In arguing that the issue should not have been submitted to the jury, petitioner is in effect saying that no group of reasonable men could, on this evidence, have reached that conclusion. The issue at this stage is not what a court, faced with the duty of resolving evidence, might itself have concluded with respect to that evidence. The question is whether there was sufficient

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[3] The judge had told the jury that the issue was whether petitioner, not otherwise so inclined, was induced to disobey the law through the inducement of Kowel (R. 103). His final words on this issue were "It will be for you to say, having examined the evidence, having listened to the testimony of the witnesses, whether this defendant has been shown by the margin of proof that I have explained to have been 'ready and willing' to commit the offense charged" (R. 105). See *supra*, pp. 7-11.

Petitioner does not challenge the trial court's instructions. See Pet. Br. 2, 7-15.

evidence to submit the issue to the jury for its determination. As this Court said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254, a motion for a directed verdict raises a question of law "which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict."

Petitioner's attack upon the sufficiency of the evidence with respect to entrapment has two facets. On the facts, he assumes that the jury was bound to accept his own version of his dealings with Kowel and to reject the prosecution's testimony; on the law, he assumes that the mere fact that he had not previously been shown to have engaged in the narcotics trade necessarily negatived any criminal predisposition to commit the offense and was in itself conclusive that the sale initiated by the government agents was the result of entrapment. Neither assumption is justified.

I. *The evidence presented a factual issue for the jury as to whether petitioner intended to engage in the narcotics traffic whenever a likely buyer presented himself, prior to any suggestion by a government agent.*

1. From the point of view of Marshall, the government narcotics agent and chief witness for the prosecution, this is what occurred:— An informant, Kowel, reported that petitioner, with whom he had had dealings in quinine, had said "if he [the informant] ever had anyone who was interested in purchasing narcotics, he should bring him over" (R. 18).

Since this indicated that petitioner had a source of narcotics, the agent felt justified in pursuing the matter. Then, when the agent met petitioner, the conversation immediately turned to narcotics, thus confirming Kowel's information that petitioner was ready to deal in that commodity. Petitioner further confirmed that information by saying that, while primarily he was a gambler, "he knew the right people in the narcotics traffic"; that he knew "someone whom he considered high up in the narcotics traffic." (R. 7).[4] Petitioner also mentioned that he was interested in making money, and exchanged telephone numbers with Marshall so that they could keep in touch with each other (R. 27, 7, 69-70). The next day, according to petitioner's own testimony, he assured Marshall that he was "trying" to find a source of supply for narcotics (R. 70-71). Thereupon, for the next six weeks prior to the ultimate sale, petitioner voluntarily exerted his best efforts to obtain a source of supply. Petitioner had told Marshall that he had had a falling out with those he once knew (R. 7) and it evidently took him some time to make a new contact. The agent, in calling petitioner dur-

[4] The evidence just recited—for example, petitioner's remark to Kowel that if the latter knew anyone interested in buying narcotics he should "bring him over" (see the Statement, *supra*, pp. 3-4)—discloses that the idea of dealing in narcotics was in petitioner's mind prior to the time he was approached by any government agent. This is contrary to the assumption of fact upon which the dissent below is predicated, *i.e.*, that, despite petitioner's ready complaisance, the thought of dealing in narcotics was first implanted by a government agent. The evidence favorable to the prosecution belies that theory.

ing the six weeks before the sale, was not calling a reluctant person in order to induce a crime. The agent was keeping in touch with a person who appeared to him eager to make a sale in order to get, as the agent ultimately did, to the source of illegal supply. From what was known to him about petitioner, Marshall had no reason to suspect that he would be inducing an innocent man to commit a crime. Certainly, the jury could properly have believed that Marshall had reason to think that he was dealing with a willing, eager, potential seller of narcotics.[5]

2. Petitioner does not really dispute the fact that Marshall, the government agent, did not persuade him to commit the crime. He admitted on the stand that he posed to Marshall as a big dealer. His defense centered, rather, on his testimony concerning inducement by Kowel before Marshall came into the pic-

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[5] See *Zucker* v. *United States*, 288 Fed. 12, 16-17 (C.A. 3), certiorari denied, 262 U.S. 756, where the court said:

"While the government officials were persistent in having Zucker bring them into communication with persons from whom they could secure alcohol, yet when they approached him, although he said that he did not handle it himself, he did not hesitate to communicate with the other defendants and have them enter into negotiations for the sale of alcohol. * * * While the government officials went to his store quite a number of times, it does appear that Zucker was never really induced and lured into committing the crime against his will, but, on the contrary, from the very start he was willing to assist the officials in entering into an arrangement with the defendants to purchase the alcohol. He was apparently willing to go along and assist in the enterprise, provided he saw the money. He nowhere appeared unwilling to help. The delay seemed due to tardiness in producing the money to consummate the deal."

ture or at times when Marshall was not there. The approach throughout the proceedings was that his own testimony as to his relations with Kowel had to be credited in full and that on this basis the defense of entrapment had been established. Thus, his motion to direct a verdict of not guilty was predicated on the ground that he "never had any thought in mind" of making a sale of narcotics until Kowel implanted the idea (R. 96-97). In his motion to set aside the verdict, petitioner's attorney argued (R. 111):

> The testimony of the defendant with reference to these conversations had with Jack Pavelski [Kowel], by whom he alleges he was induced to enter into this conspiracy to sell the narcotics was uncontroverted. It was believable as a matter of law. It was not subject to suspicion, and it is probable that it occurred as set forth by this defendant during his testimony, and the verdict of the jury is contrary to its weight.

The jury was not, however, bound to credit the whole of petitioner's version of his conversations with Kowel. See *United States* v. *Lemons*, 200 F. 2d 396, 398 (C.A. 7). It had many inconsistencies. For instance, petitioner said that although Kowel tried to get him to sell quinine he never did; that although Kowel had previously tried to get him to deal in narcotics he refused. Yet, in his own version, despite all this prior unwillingness to fall in with Kowel's plans, he was the one to whom Kowel turned when Kowel wanted someone to pose as a big narcotics dealer. Further, he admitted that,

when he actually arranged for the sale of narcotics, Kowel was not in the "picture" at all. Kowel did not introduce him to Seifert and Kowel did not take part in the sale (R. 85-86, 92). *Supra*, pp. 4-5, 7.

It is significant that petitioner made no attempt to call Kowel as a witness. He apparently knew where he was. On cross-examination of the government agent, petitioner's attorney asked when the agent had last seen Kowel. After the agent testified that in the spring of 1951 Kowel had said he was going to California, petitioner's attorney asked: "As a matter of fact, Mr. Marshall, didn't he leave his wife and children and go to the West Coast by himself" (R. 19). It was petitioner's duty, and not the government's, to produce, or make an effort to produce, Kowel as a witness if he believed Kowel would substantiate his own testimony. From the government's point of view, Kowel was merely the means of bringing Marshall, the government agent, to petitioner. The agent's testimony thereafter related to his direct dealings with petitioner. It was petitioner's defense testimony which made Kowel—and his relations with petitioner—a prime issue. Petitioner chose to rely solely on his own testimony with respect to his dealings with Kowel in support of his position on that issue. It was for the jury to decide whether to credit his testimony or not, and, in the main, it clearly disbelieved his self-serving version of the events and believed the evidence favorable to the prosecution.[6]

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[6] As the Court of Appeals observed (R. 116), the jury was entitled to take into account, in evaluating the proofs

3. In short, this is, at bottom, simply another case in which the evidence presented a conflict which was for the jury to resolve. On the one hand, there was the government's evidence that petitioner was ready to engage in the narcotics traffic as soon as a likely buyer presented himself, that he expressly invited approaches, and that he was eager to accomplish a sale when the buyer appeared. In the light of this evidence the suggestion that petitioner make the sale to Marshall was an offer to a person who already had the criminal intent, and merely enabled him to carry out his previous design. On the other hand, there was petitioner's version that he had no thought of dealing in narcotics until Kowel put the idea into his mind; that he still did not think of dealing in narcotics when he first met Marshall but was merely posing; that only later, even though Kowel was "no longer in the picture," he decided to go through with a sale of narcotics. The jury cannot be said to have been unreasonable in failing to credit petitioner's version of events and in accepting that of the prosecution witnesses. There is therefore no occasion to set aside its verdict.

That the issue was one for the jury, and not for the court, is clear from this Court's decision in *Sorrells* v. *United States*, 287 U.S. 435, the leading case

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on entrapment, petitioner's testimony that he had consistently rebuffed the importunities he said that Kowel made. Together with the prosecution's evidence, this testimony supports the jury's finding that petitioner was not persuaded by Kowel to engage in crime, but that he already had the necessary criminal predisposition.

on entrapment.[7] There, a secret government agent, who had been in the same army division with the defendant during World War I, visited his house as a guest and, while visiting, asked him to procure some liquor about three or four times before the defendant finally went out and did procure some liquor. The agent admitted that his purpose was to prosecute the defendant for procuring and selling the liquor. There was no evidence that the defendant had ever possessed or sold liquor prior to this, although there was evidence that he had a reputation as a rum runner. The Court held that the trial court erred in holding as a matter of law that there was no entrapment, and that the issue should have been submitted to the jury. It is significant, too, that the Court did not direct an acquittal on the basis of the strong showing of entrapment made by Sorrells, but remanded the issue for trial. On the evidence in the

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[7] Previous to the *Sorrells* decision, in cases arising under the postal laws in which government officers, having information that the law was being violated, had written decoy letters asking the accused to send obscene matter through the mails, this Court held that such inducement is no defense in a prosecution for acceding to the officer's request. *Rosen* v. *United States*, 161 U.S. 29, 42; *Andrews* v. *United States*, 162 U.S. 420, 423; *Price* v. *United States*, 165 U.S. 311, 315. For other cases recognizing the validity of decoy letters in obtaining prosecutions, see *Grimm* v. *United States*, 156 U.S. 604, 610-611; *Goode* v. *United States*, 159 U.S. 663, 669. In *Casey* v. *United States*, 276 U.S. 413, 418-419, the majority, speaking through Mr. Justice Holmes, refused to hold that the defense of entrapment had been established, upon its own motion and upon a record which was not intended to present that question.

present record, there was at least as much of a jury issue here as there was in *Sorrells*.[8]

II. *The fact that petitioner was not shown to have dealt previously in narcotics does not per se establish the defense of entrapment.*

There runs through petitioner's brief—and, in part, through Judge Frank's dissent below—the thought that the mere fact that petitioner had not previously been shown to have engaged in narcotics, in itself, was sufficient to establish his defense of entrapment.

To the extent that this argument rests on the factual assumption that petitioner had no idea of dealing in narcotics until approached by Kowel—an assumption made by the dissenting opinion below (see fn. 4, *supra*, p. 15)—it rests on a view of

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[8] There are numerous lower court decisions upholding convictions where the entrapment issue was submitted to the jury under conflicting evidence. *E.g., Sherman* v. *United States*, 241 F. 2d 329, 333 (C.A. 9), certiorari denied, 354 U.S. 911; *Kivette* v. *United States*, 230 F. 2d 749, 754 (C.A. 5); *Archambault* v. *United States*, 224 F. 2d 925, 929 (C.A. 10); *Silva* v. *United States*, 212 F. 2d 422 (C.A. 9); *Rucker* v. *United States*, 206 F. 2d 464 (C.A. D.C.); *Ryles* v. *United States*, 183 F. 2d 944 (C.A. 10), certiorari denied, 340 U.S. 877; *United States* v. *Spadafora*, 181 F. 2d 957, 958-959 (C.A. 7), certiorari denied, 340 U.S. 897; *United States* v. *Kendall*, 165 F. 2d 117 (C.A. 7); *Kott* v. *United States*, 163 F. 2d 984, 987-988 (C.A. 5), certiorari denied, 333 U.S. 837; *United States* v. *Brandenburg*, 162 F. 2d 980, 981-982 (C.A. 3), certiorari denied, 332 U.S. 769; *United States* v. *Lindenfeld*, 142 F. 2d 829, 831 (C.A. 2), certiorari denied, 323 U.S. 761; *United States* v. *Polakoff*, 121 F. 2d 333, 335 (C.A. 2), certiorari denied, 314 U.S. 626; *Newman* v. *United States*, 299 Fed. 128, 131-132 (C.A. 4).

the evidence which the jury was not required to adopt. As pointed out *supra*, pp. 14-18, there was testimony favorable to the prosecution, which the jury was free to credit, that petitioner had formed the design of engaging in the narcotics traffic before he met Marshall as a potential buyer, and independently of his dealings with Kowel. His conduct when he met Marshall was entirely consistent with that view.

As a matter of law, it is clear that the mere fact that the sale comes at the instance of a government agent does not show entrapment. The *Sorrells* case, *supra*, 287 U.S. 435, involved a situation where there was no proof of prior similar criminal activity by the defendant. In the majority opinion of Chief Justice Hughes, it was said (pp. 441-442):

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. [Citing cases]. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the al-

leged offense and induce its commission in order that they may prosecute.

And later, in speaking of the defense of entrapment, the opinion continues (pp. 451-452):

> * * * *For the defense of entrapment is not simply that the particular act was committed at the instance of government officials.* That is often the case where the proper action of these officials leads to the revelation of criminal interprises. [Citing case]. *The predisposition and criminal design of the defendant are relevant.* But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense. [Emphasis added.]

The real issue under *Sorrells* is "whether the defendant is a person *otherwise innocent* whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." (Emphasis added.) Although the

initial action leading to commission of the offense comes from the government agent or informer, there is no entrapment if other evidence shows that the criminal design originated with the accused or existed prior to the dealings with the government agent. *E.g., Henry* v. *United States*, 215 F. 2d 639, 640 (C.A. 9); *Demos* v. *United States*, 205 F. 2d 596, 597-598 (C.A. 5), certiorari denied, 346 U.S. 873;[9] *United States* v. *Perkins*, 190 F. 2d 49, 50-51 (C.A. 7); *Cratty* v. *United States*, 163 F. 2d 844, 851 (C.A. D.C.); *United States* v. *Lindenfeld*, 142 F. 2d 829, 830-831 (C.A. 2), certiorari denied, 323 U.S. 761; *Price* v. *United States*, 56 F. 2d 135, 136 (C.A. 7); *Swallum* v. *United States*, 39 F. 2d 390, 391, 392 (C.A. 8). This may be true even though the government agent or the informer repeats a suggestion on several occasions before the accused commits the offense. Cf. *United States* v. *Sawyer*, 210 F. 2d 169, 170-171 (C.A. 3); *Zucker* v. *United States*, 288 Fed. 12, 13-17 (C.A. 8), certiorari denied, 262 U.S. 756; *Newman* v. *United States*, 299 Fed. 128, 129-130 (C.A. 4).[10]

Proof of prior similar action would of course be relevant as tending to disprove innocence on the part

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[9] In *Demos*, the court states (205 F. 2d at 599): "For the offense to originate in the mind of the defendant, it was not necessary that the defendant be the instigator of the particular sale or act, but only that she have the general intention to commit such an offense whenever the opportunity offered."

[10] See, also, the Brief for the United States in *Sherman* v. *United States*, No. 87, this Term, at pp. 13-14, 16-17.

of the defendant."[11] But proof of such prior similar action is not the only way to show that the intention to commit the crime originated with the defendant, rather than with the agent. Every first offender who deals with an agent is not entrapped. Any evidence which has a logical bearing on the central issue—an innocent mind induced into crime by the creative activity of government officials—is pertinent to that issue. Conversely, any evidence sufficient to convince reasonable men beyond a reasonable doubt of the defendant's lack of innocence is sufficient to negative the defense of entrapment; no special type of evidence is essential or required. No attempt at categorization would completely cover all the types of evidence that could have a bearing on the central issue. Judge Learned Hand did, however, summarize the usual classes of pertinent evidence in his opinion in *United States* v. *Sherman*, 200 F. 2d 880, 882-883. (C.A. 2). In construing *Sorrells*, he said:

> As we understand the doctrine it comes to this: that it is a valid reply to the defence, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offence charged, whenever the opportunity of-

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[11] *Gilmore* v. *United States*, 228 F. 2d 121, 122 (C.A. 5); *United States* v. *De Marie*, 226 F. 2d 783, 785 (C.A. 7), certiorari denied, 350 U.S. 966; *Henry* v. *United States*, 215 F. 2d 639, 641 (C.A. 9); *United States* v. *Johnson*, 208 F. 2d 404, 406 (C.A. 2), certiorari denied, 347 U.S. 928; *Lunsford* v. *United States*, 200 F. 2d 237, 239 (C.A. 10); *Nero* v. *United States*, 189 F. 2d 515, 516 (C.A. 6), certiorari denied, 342 U.S. 872; *United States* v. *Roett*, 172 F. 2d 379, 380-381 (C.A. 3), certiorari denied, 336 U.S. 960.

> fered. In that event the inducement which brought about the actual offence was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize his preexisting purpose. The proof of this may be by evidence of his past offences, of his preparation, even of his "ready complaisance."[12] Obviously, it is not necessary that the past offences proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offences of the sort charged.
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> Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it. * * *

It was under the rule of this *Sherman* opinion that this case was submitted to the jury. See the Statement, *supra*, pp. 8-11. As we have shown in Point I, *supra*, pp. 14-21, there was sufficient evidence favorable to the prosecution—regarding petitioner's ac-

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[12] In the earlier case of *United States* v. *Becker*, 62 F. 2d 1007, 1008 (C.A. 2), Judge Hand, in defining the possible proof of an accused's preexisting purpose to commit the offense, had used this slightly different language: "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance."

tions and declarations—to justify the jury in finding, beyond a reasonable doubt, that "the prosecution [had] not seduced an innocent person but [had] only provided the means for the [petitioner] to realize his pre-existing purposes" (R. 105). In these circumstances, proof of prior dealings in narcotics was not essential.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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SEPTEMBER 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 436156 340